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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CHERIE LEE FORSTEIN et al., Defendants and Appellants.	C036734 (Super.Ct.No. 99F07738)

A jury convicted defendants Cherie Lee Forstein, Curtis Howard, and James C. Stringer of various charges arising from the shooting death of 18-year-old Howard Morris, Jr.,[1] and assault of his 13-year-old brother LaMarr on September 22, 1999. It convicted Forstein of first degree murder in count one, and found true the allegation she was a principal in the offense, and that a principal was armed with a firearm. (Pen. Code,

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[1] To avoid confusion with defendant Curtis Howard, we will refer to Howard Morris, Jr., as Morris, and to his father as Howard Morris, Sr. We will refer to LaMarr Morris as LaMarr.

§§ 187, subd. (a), 12022, subd. (a)(1).)[2] The court sentenced Forstein to 25 years to life plus a one-year enhancement.

The jury convicted Howard of first degree murder in count one, and found true the allegation he personally discharged a firearm causing great bodily injury. (§§ 187, subd. (a), 12022.53, subd. (d).) As to count two, it convicted Howard of assault with a firearm, and found true the allegation he personally used a handgun in committing the offense. (§§ 245, subd. (a)(2), 12022.5, subd. (a)(1).) The court sentenced Howard to two indeterminate terms of 25 years to life in count one, and a determinate term of seven years in count two, for a total sentence of 57 years to life.

As to Stringer, the jury convicted him of second degree murder in count one, and found true the allegation he was a principal in the offense, and that a principal was armed with a firearm. (§§ 187, subd. (a), 12022, subd. (a)(1).) In count two, the jury convicted Stringer of assault with a firearm, and found true the allegation he personally used a firearm in committing the offense. (§ 245, subd. (a)(2), 12022.5, subd. (a)(1).) In count three, the jury convicted him of being a felon in possession of a firearm. (§ 12021, subd. (a)(1).) The court found true the allegation Stringer served a prior prison term within the meaning of section 667.5, subdivision (b). It sentenced Stringer to a total term of

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[2] Undesignated statutory references are to the Penal Code.

17 years to life: an indeterminate term of 15 years to life plus a one-year enhancement in count one; a concurrent term of four years plus a 10-year enhancement in count two; a determinate term of three years in count three which was stayed; and one year for the prior prison term enhancement.[3]

On appeal, Forstein argues: (1) there is insufficient evidence to sustain her conviction of first degree murder on theories of vicarious criminal liability; and (2) the court erred in failing to address her claims of jury misconduct.

Howard contends the court erred in: (1) admitting Forstein's out-of-court statements; (2) admitting a picture of the victim while alive; and (3) instructing the jury.

Stringer asserts: (1) there is insufficient evidence to support his conviction of second degree murder on theories of aiding and abetting liability; (2) the court erred in admitting Forstein's out-of-court statements; (3) the court erred in instructing the jury; and (4) the court erred in failing to address claims of jury misconduct.

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[3] Contrary to the court's oral pronouncement of judgment, the abstract of judgment lists the 10-year enhancement as consecutive, making Stringer's total sentence 27 years to life. Where the abstract of judgment differs from the trial court's oral judgment, the oral pronouncement controls. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) "'[A] court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts.'" (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Courts may correct clerical errors at any time, and we shall follow the practice that allows appellate courts to order correction of the abstract. (*Id.* at pp. 183, 185.)

Forstein, Howard, and Stringer each join in the arguments of their codefendants.

We affirm the judgments for reasons we shall explain.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Cherie Lee Forstein and her 13-year-old son Chad moved to the Franklin Villa apartment complex in the summer of 1999. Conflicts arose with the neighbors, particularly between Chad and people she described as "the local gangsters." Forstein reported numerous threats and assaults to the police. She did not move out of the complex because she was unable to find a place that would accept Chad's Rottweiler. Forstein told her mechanic, Dean Madeiros, and her employer, Frank Munoz, that she would bring in some muscle to deal with the neighborhood problems.[4] She explained that her "ex" was a bail bondsman who lived in San Francisco.

Chad made friends with another teenager in the complex, the assault victim LaMarr. The friendship soured when Chad lost his pager and accused LaMarr of taking it. On another occasion, Chad sprayed -- or threatened to spray -- LaMarr with mace his mother had given him.

During the same period, Forstein had several confrontations with Wanda Frazier, LaMarr's mother. After one incident, a friend informed Frazier that Forstein said she was going to "get one-eyed Jimmy and come back and kill" Frazier's children.

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[4] The court admitted the testimony of Munoz only as to Forstein.

Another time, Forstein yelled at Frazier, mentioned a gun, and said she would not take "this bullshit." She continued, "I'll kill all these mother fuckers."

On September 7, 8, and 9, 1999, Forstein left telephone messages for Chad's father, the 78-year-old defendant Curtis Howard. She explained that Chad was in danger, and threatened to kill Howard if he failed to pay the money he owed so she could move.

On Monday, September 20, 1999, Forstein stopped LaMarr outside her apartment on his way home from school. She grabbed him by the collar, pushed him against a tree, and told him Chad's father was a bail bondsman with a lot of power. Forstein said Chad's father knew someone named "one-eyed Jimmy," and other "crazy people," who would come to Sacramento and kill for him. LaMarr testified the threats were directed toward his brother and father.

At that point, Frazier came out of her apartment across the alley, and the two women began yelling at each other. During the argument Forstein said, "I'm tired of you black nigger disrespecting my house." She told Chad to leave "the mother fuckers" alone because she was going to kill them.

Forstein, Chad, and Chad's friend Keith Hodges went to Edna Jean Finch's house after the September 20 confrontation with Frazier. Morris, LaMarr's older brother, ran up to the door. Frazier, Morris's mother, stopped him from trying to get inside, saying "it's not worth it." Forstein asked Chad to get the phone and call someone. The line was busy the first time he

tried to reach his father, but he tried again. Chad dialed the number and handed the phone to Forstein. Hodges overheard part of the conversation in which Forstein stated: "I got a job for you, come here as soon as possible, I need you to get rid of these two black niggers . . . ."

Frazier saw Forstein leave the complex 45 minutes or an hour after the confrontation. Forstein returned 20 minutes later, and pulled into her driveway. At that point, Howard Morris, Sr., young Morris's father, pulled up and got out of his car. He spoke with Forstein for a few minutes, and drove away with LaMarr. Forstein followed them out of the complex. Robert Price, the security guard, overheard Forstein tell Howard Morris, Sr., "[T]hat's okay, I get my fellows to come down here and teach you niggers something." She also said, "I'm going to have one-eyed Willie come over and kill a bunch of you mothers."

Forstein and Chad went to San Francisco that night, and stayed with Howard for two days. They returned to Sacramento on Wednesday, September 22. Accompanying them in a separate car were Howard, and his driver, defendant James Stringer, who was a skip tracer in the bail bond business. Both Howard and Stringer were armed.

Upon arriving at Franklin Villa, Forstein went to check her mail near where LaMarr was sitting. She walked up to LaMarr, grabbed him by the head, and said, "[L]ook what [you got yourself] into." Around the same time, Forstein warned Finch and her son Donny that she had her people with her and things were going to "come down."

Shortly thereafter, Howard and Stringer got out of their car and approached LaMarr. One of the men showed the boy a badge, and patted him down. Both Howard and Stringer pointed their guns at LaMarr, and one stuck a gun in the 13-year-old's side. Howard told LaMarr he was going to kick in his teeth. LaMarr started to walk away. Stringer grabbed him and smashed his hand against the mailbox, breaking two bones.

Forstein, Howard, Stringer, and Chad ended up at Forstein's apartment. Forstein cleaned up the mess the dog left in their absence. Chad and Stringer began playing Play Station. Howard brought the guns from the car, put one gun under the mattress, kept the other gun with him, and went back outside.

Meanwhile, LaMarr ran to Shirley Hamilton's apartment and called 911. He told the dispatcher that two men had threatened to arrest him and said they were coming to get his father and brother. LaMarr went back outside to wait for an officer to arrive. One police car drove up, but left immediately to take another call. At that moment Morris walked up with two friends. Morris was 5 feet 11 inches tall, and weighed 207 pounds. After hearing what had happened, Morris went inside Hamilton's apartment and called his mother. He then went to his own house, grabbed a metal baseball bat, and headed for the door. LaMarr and the two other young men tried to block his way, but Morris left through an open window. One witness heard Morris yell for Chad to come out with his dog and nunchaks.

There was conflicting testimony about the baseball bat. However, the witnesses generally agreed Morris had nothing in

his hands when he walked toward Howard. The older man pulled out his gun and pointed it at Morris. Morris held up his hands with his palms forward and began backing up. Howard fired from a short distance away, and Morris fell to the ground. Howard fired a second and fatal shot at Morris's head.

Howard reloaded his gun, and warned members of the gathering crowd not to approach the victim. Shortly thereafter, he surrendered peacefully to police officers. Officer Michael Galipeau recounted that Howard stated as he approached, "[P]eople need to be getting killed on this corner trying to hurt my son, all these people need to get a life." Later, at the police station, Galipeau asked Howard whether he had any sharp objects in his pockets. Howard said he did not, and continued, "I would not want to hurt you, you have done nothing to me, I did what I came here to do and I'm done."

At trial, Howard testified in his own defense. He admitted taking the gun with him when he left Forstein's house, and intentionally firing the shot that killed Morris. However, he also stated, "I was afraid because he wanted to catch me to take my gun, and if he take my gun he going to kill me and Chad." The defense introduced expert testimony that defendant suffered a stroke in 1996 which resulted in dementia.

DISCUSSION

I

Forstein's Appeal

The prosecution offered various theories on which to convict Forstein of first degree murder as a non-shooter:

(1) she aided and abetted the murder of Howard Morris, Jr., by bringing people from San Francisco to kill somebody; (2) she aided and abetted the assault on LaMarr by bringing people from San Francisco to push people around, and the murder of Morris was the natural and probable consequence of that assault; and (3) she conspired with Howard to murder Morris, or assault LaMarr, and the murder was a natural and probable consequence of the assault. On appeal, Forstein challenges the sufficiency of the evidence. Both Forstein and Stringer contend they were prejudiced by jury misconduct.[5]

A. First Degree Murder as an Aider and Abettor:

Forstein argues there is insufficient evidence to convict her under any theory of vicarious liability. With respect to the aiding and abetting theory, she contends there is no evidence that she knew of Howard's intent, or had the intent to assist him in committing murder. As to the conspiracy theory, Forstein maintains there is no evidence that she was aware of Howard's plans, or agreed in advance that he shoot Morris. She also rejects as unsupported any finding that Morris's murder was a natural and probable consequence of her conspiring or aiding and abetting an assault on LaMarr. Specifically, Forstein insists there is no evidence "that Morris's spontaneous act of confronting Howard some 30 minutes after the assault on LaMarr

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[5] Because Stringer expressly joined and briefed the claim of jury misconduct raised by Forstein, we address their arguments together.

ended, or Howard's taking out a gun and shooting Morris, . . . might have been anticipated, because they both resulted from and were dependent upon an intervening and unexpected act: Morris's confrontation of Howard."

We review "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Hatch* (2000) 22 Cal.4th 260, 272.) "In reviewing sufficiency of the evidence, we . . . presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Lewis* (1990) 50 Cal.3d 262, 277.) Substantial evidence includes circumstantial evidence and reasonable inferences flowing from that evidence. (*In re James D.* (1981) 116 Cal.App.3d 810, 813; see *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999.) Where, as here, a defendant challenges the factual sufficiency of multiple theories of criminal liability, we will affirm if there is substantial evidence to support any one theory, absent an affirmative indication in the record that the verdict actually did rest on an inadequate ground. (*People v. Johnson* (1993) 6 Cal.4th 1, 42; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) We conclude there is sufficient evidence to support Forstein's conviction as an aider and abettor of Morris's murder, and need not specifically address the alternate theories on appeal.

"[A]n aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*).) We consider the first kind of aider and abettor liability here.

The *McCoy* court reiterated that although the mental state required of an aider and abettor is different from that required to convict the actual perpetrator, the aider and abettor is no less culpable. "On the contrary, outside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator. 'To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted "with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." [Citation.] When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator"; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." [Citation.]' [Citation.] What this means here, when the charged offense and the intended offense -- murder or

attempted murder -- are the same, i.e., when guilt does not depend on the natural and probable consequences doctrine, is that the aider and abettor must know and share the murderous intent of the actual perpetrator." (*McCoy*, *supra*, 25 Cal.4th at pp. 1117-1118, emphasis in original.)

The record supports the inference Forstein knew Howard intended to kill the people she described as threatening Chad at Franklin Villa, and gave aid and encouragement to him in committing the intended crime. Numerous witnesses recounted Forstein's threats to bring people from San Francisco to kill LaMarr and his family. Forstein telephoned Howard on September 20, 1999, saying: "I got a job for you, come here as soon as possible, I need you to get rid of these two black niggers . . . ." Forstein drove to San Francisco the same day, stayed with Howard, and returned with him and Stringer two days later to carry out the plan using the handguns they brought with them. Forstein also assisted by pointing out LaMarr to Howard and Stringer. The jury could infer the assault on LaMarr was intended to provoke a response from his family. After Howard's arrest, he told Officer Galipeau, "I did what I came here to do and I'm done."

Forstein acknowledges that we, as a reviewing court, "must respect the exclusive province of the jurors to draw <u>reasonable</u> inferences from the record, . . ." (Underscoring in original.) We conclude it was reasonable for the jury to infer Forstein shared with Howard the intent to kill Morris, and that she aided and encouraged him in achieving that end.

B. Jury Misconduct:

As a general rule, "[e]vidence obtained by jurors from sources other than in court is misconduct and constitutes grounds for a new trial if the defendant has been prejudiced thereby. (. . . § 1181, subd. 2.)" (*People v. Williams* (1988) 44 Cal.3d 1127, 1156 (*Williams*).) In addition, the court must instruct jurors not to "converse among themselves, or with anyone else, on any subject connected with the trial; . . ." (§ 1122.) "Misconduct creates a presumption of prejudice that may be rebutted by a showing that no prejudice actually occurred." (*Williams, supra,* at p. 1156.) "A sitting juror's actual bias, which would have supported a challenge for cause, renders him 'unable to perform his duty' and thus subject to discharge and substitution under sections 1089 and 1123." (*People v. Keenan* (1988) 46 Cal.3d 478, 532.) Where a party seeks discharge of a juror for misconduct, the court's failure to conduct a hearing sufficient to determine good cause is an abuse of discretion. (*Ibid.*)

Here, the claims of misconduct arose on the tenth day of trial, when the bailiff informed the court that three female jurors felt uncomfortable because of the way Stringer was looking at them. The court and counsel discussed the matter the following morning outside the presence of the jury. Forstein's counsel moved to excuse Jurors No. 4, No. 5, and alternate No. 3 for cause.

Questioning of the three jurors by the court and counsel revealed that the women were bothered by Stringer's attempt to

make eye contact with them, and by his body language in response to witness testimony. Juror No. 4 had noticed the problem the week before. All three admitted speaking with each other before they approached the bailiff with their concerns. They also questioned Juror No. 11. Jurors No. 4, No. 5, and alternate No. 3 stated they could remain objective about the facts of the case as long as the court was aware of Stringer's conduct, and something was done to stop it. Juror No. 11 said she mentioned eye contact with a defendant to Juror No. 4. She told the court the eye contact was with Forstein. However, Juror No. 11 told the court that the incident caused her no concern. She had not heard any juror other than Juror No. 4 mention the issue.

Counsel for Forstein renewed his motion to excuse the jurors, and moved for mistrial. Stringer's counsel joined in Forstein's motions. The court denied both motions. It identified two aspects of the question of jury misconduct: (1) the impact of the jurors' perception of the defendants' conduct, including the possibility the jurors were "overly sensitive or misconstruing;" and (2) the jurors' discussion of defendants' conduct among themselves. As to the first, the court found it was not misconduct for jurors to react to the kind of conduct displayed by the defendants. The court also found that the discussions among the jurors were insufficient grounds for mistrial. It noted that the jurors' discussions did not involve the facts of the case or issues of trial "other than their uncomfortable feeling and reaction to a defendant's conduct and what to do about it. [¶] . . . [¶] . . . [T]hey did

the right thing to bring it to the bailiff's attention. They did the wrong thing in discussing it between themselves before they brought it to the bailiff's attention." Forstein raised the question of jury misconduct in her motion for new trial, which the court also denied.

On appeal, Forstein and Stringer contend the court erred in ruling there was no jury misconduct and no further action was warranted.[6] They argue the court should have replaced three of the jurors because the reactions they reported amounted to information outside the record that affected their ability to be impartial. Forstein and Stringer also maintain the court abused its discretion in failing to question all the jurors after four jurors admitted that they had discussed their observations and reactions with each other.

"In determining whether misconduct occurred, '[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.]'" (*People v. Majors* (1998) 18 Cal.4th 385, 417.) We review Forstein's and Stringer's challenges to the trial court rulings under the abuse of discretion standard. (*People v. Mayfield* (1997) 14 Cal.4th 668, 756 [motion for mistrial]; *People v. Turner* (1994) 8 Cal.4th 137, 212 [motion

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[6] Howard joins in his codefendants' arguments on appeal "as they may be favorable to him." However, because he failed to join in Stringer's and Forstein's motions relating to jury misconduct at trial, Howard lacks standing to raise those issues here. (*People v. Brown* (1980) 110 Cal.App.3d 24, 35-36.)

for new trial]; and *People v. Zapien* (1993) 4 Cal.4th 929, 997 (*Zapien*) [whether there is good cause to discharge a juror under § 1089].) We conclude the record supports the court's finding there was no misconduct, and the court did not abuse its discretion in denying the motions to excuse specific jurors, for mistrial, and for new trial.

It is unclear whether the rule regarding evidence from outside sources "applies to the jurors' perceptions of the defendant, particularly when the defendant engages in disruptive or otherwise improper conduct in court. As a matter of policy, a defendant is not permitted to profit from his own misconduct." (*Williams*, *supra*, 44 Cal.3d at p. 1156.) In *Williams*, an alternate juror informed the court that defendant had threatened the jury when it returned the verdict in the guilt phase of a capital trial. (*Id.* at p. 1154.) The issue of "invited misconduct" also arose in *People v. Hines* (1997) 15 Cal.4th 997, 1053-1055. In that case, two jurors received telephone calls from defendant at home, and discussed the calls with individuals outside the jury, including the police. (*Id.* at pp. 1053-1054.) Citing *Williams*, the Supreme Court ruled: "Defendant is barred from complaining about any conceivable misconduct . . . in accepting his call because he invited any 'misconduct' by making the telephone call in the first place. [Citation.] Nor did [the jurors] act improperly when they discussed the calls with others: Although they were not permitted to discuss the *facts* of defendant's case with others, this prohibition did not extend to the telephone calls he made to them." (*Id.* at p. 1054,

emphasis added.) We agree with the Attorney General that, as a matter of policy, Stringer and Forstein may not complain the jurors committed misconduct based on defendants' own attempt to make eye contact with the jurors, acts the jurors could reasonably construe as improper.

We also conclude the court properly found the jurors' reactions to defendants' actions was not misconduct which justified removal of the jurors or mistrial. "'[W]hen the alleged misconduct involves an unauthorized communication with or by a juror, the presumption (of prejudice) does not arise unless there is a showing that the content of the communication was about the matter pending before the jury, i.e., the guilt or innocence of the defendant. [Citations.]'" (*In re Hamilton* (1999) 20 Cal.4th 273, 305-306.) However, even if we were to assume the juror's reaction to defendants' efforts at eye contact constituted misconduct, the presumption of prejudice was rebutted by evidence no prejudice actually occurred. (*People v. Honeycutt* (1977) 20 Cal.3d 150, 156.) The *Williams* court explained: "'[W]hether a defendant has been injured by jury misconduct in receiving evidence outside of court necessarily depends upon whether the jury's impartiality has been adversely affected, whether the prosecutor's burden of proof has been lightened and whether any asserted defense has been contradicted. If the answer to any of these questions is in the affirmative, the defendant has been prejudiced and the conviction must be reversed. On the other hand, since jury misconduct is not per se reversible, if a review of the entire

record demonstrates that the appellant has suffered no prejudice from the misconduct a reversal is not compelled.' [Citation.]" (*Williams, supra,* 44 Cal.3d at p. 1156.)

Here, the court emphasized that the discussion among the jurors did not involve "any of the facts, testimony and issues of the trial other than their uncomfortable feeling and reaction to a defendant's conduct and what to do about it." Moreover, Jurors No. 4, No. 5, and alternate Juror No. 3 assured the court that Stringer's and Forstein's attempts to make eye contact would not affect their ability to judge defendants fairly, as long as the conduct stopped. Juror No. 11 said the incident caused her no concern. There is no evidence the defendants continued their efforts to make eye contact with jurors after the conduct was brought to the court's attention.

We also reject Stringer's and Forstein's claim that given the four jurors' admission that they discussed defendants' attempts at eye contact among themselves, the court abused its discretion in failing to question all the jurors to determine if others were affected. The court acknowledged that jurors "discuss Judges, lawyers, defendants, witnesses, demeanor, conduct, [and] reactions to things," but expressly found that Stringer's and Forstein's actions were "not that significant a piece of information to be discussing among themselves." After questioning Jurors No. 4, No. 5, No. 11, and alternate No. 3, the court was satisfied they could continue to be fair and objective. Juror No. 11 also testified she had not heard any other juror mention the issue. On this record, we cannot say

the court abused its discretion in denying Stringer's and Forstein's motions, and moving on with the trial. Indeed, counsel for defendants did not ask to question the other jurors, perhaps wishing to avoid calling further attention to their clients' conduct.

II

Howard's Appeal

The prosecution argued Howard was guilty of first degree murder based on "lots of evidence of planning." At trial, Howard admitted he took a gun with him when he left Forstein's house, and intentionally fired the shot that killed Morris. Raising the question of self-defense, Howard also testified, "I was afraid he wanted to catch me to take my gun, and if he take my gun he going to kill me and Chad."

On appeal, both Howard and Stringer contend the court abused its discretion in admitting Forstein's out-of-court statements.[7] Howard also challenges other evidentiary rulings and jury instructions.

A. Forstein's Out-of-court Statements:

Forstein's statements were a major focus of pretrial motions. They included: (1) messages left by Forstein on Howard's telephone recorder on September 7, 8, and 9, 1999; (2) statements made in the presence of Dean Madeiros and Frank Munoz on how Forstein planned to deal with problems

[7] Because Stringer expressly joined and briefed Howard's claim of evidentiary error, we address the arguments together.

in her neighborhood, which were admitted only as to Forstein; (3) statements made by Forstein to people in her neighborhood before September 20, 1999; (4) statements made by Forstein before and during the September 20, 1999, confrontation with LaMarr and his mother, Wanda Frazier; (5) statements made by Forstein in a September 20, 1999, telephone conversation overheard by Keith Hodges; and (6) statements made by Forstein to the Finches just before the shooting.

The court heard argument and reviewed the proffered evidence over a period of four days. It ruled that many of Forstein's statements were "relevant and admissible for purposes of arguing the existence of the conspiracy, the defendant Forstein's intention to put others together with her to accomplish a conspiracy, and it explains then arguably why defendant Stringer acted the way he did on that date." Some of the statements were admissible under the Evidence Code section 1250 exception to the hearsay rule as evidence of "state of mind, future intent, plan, motive, et cetera, to arguably prove then following conduct." The court admitted other statements as declarations of a party under Evidence Code section 1220. As to the taped telephone messages, the court admitted only part of what was offered by the prosecution, ruling that ". . . the portions that reflect Forstein's animosity towards the victims are relevant and otherwise admissible, . . . [¶] The portions that belittle defendant Howard for not protecting the son and causing the son to be in danger are relevant and admissible at least where that's all

she states within the sequence. [¶] . . . [¶] The portions that accuse defendant Howard of other wrongdoing are not admissible and are not relevant, and even if they were arguably relevant, [it] would exclude them under Evidence Code Section 352. [¶] . . . [¶] . . . [A]s far as Evidence Code Section 356, [it found] that 356 doesn't allow other portions to be admissible when one portion is played if the calls are separated by time where it wasn't continuing sequence." Regarding Hodges's testimony about the telephone conversation between Forstein and Howard, the court admitted a version that deleted references to Howard having killed two people in the past.

The court also addressed the confrontation issue, stating: "[T]hese cases now that have by and large abrogated Bruton and Aranda when statements fit within an exception to the hearsay rule and are arguably otherwise trustworthy, these statements of Miss Forstein, I believe, are admissible under both Section[s] 1250 and 1220." It denied the motions for separate trials or separate juries. Thereafter, the court instructed the jury on how to consider a codefendant's statements.[8]

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[8] The instructions read:

"Evidence of any acts done or declarations made by other conspirators prior to the time that person becomes a member of the conspiracy may be considered by you in determining the nature, objectives and purposes of the conspiracy, but for no other purpose."

The court continued, "Evidence of a statement made by one alleged conspirator other than at this trial shall not be considered by you as against another alleged conspirator unless you determine:

Howard and Stringer argue the court erred in admitting Forteins's numerous out-of-court statements over defense objection. They contend the statements were: (1) irrelevant; (2) inadmissible under the Evidence Code section 1250 state of mind exception to the hearsay rule;[9] (3) admitted in violation of their constitutional right to confront prosecution witnesses; (4) unreliable under Evidence Code section 1252;[10] and (5) more prejudicial than probative under Evidence Code section 352.[11]

"1. That from other independent evidence that at the time the statement was made a conspiracy to commit a crime existed;

"2. That the statement was made while the person making the statement was participating in the conspiracy and that the person against whom it was offered was participating in the conspiracy before or during that time; and

"3. That the statement was made in furtherance of the objective of the conspiracy.

"The word statement as used in this instruction includes any oral or written verbal expression or the non-verbal conduct of a person intended by that person as a substitute for oral or written verbal expression.

"However, statements of intent to do a future act may be considered for any purpose or against any defendant."

[9] Evidence Code section 1250 reads in part:

"(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, . . . (including a statement of intent, plan, motive, design, . . .) is not made inadmissible by the hearsay rules when:

"(1) The evidence is offered to prove the declarant's state of mind, . . . at that time or at any other time when it is itself an issue in the action; . . ."

[10] Evidence Code section 1252 provides:

"Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."

[11] Evidence Code section 352 states:

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate under consumption of

Stringer complains that the court should have excluded all the taped phone messages, but "if some came in, all should [have] come in" under Evidence Code section 356.[12]

We conclude the court did not abuse its discretion in admitting Forstein's out-of-court statements as evidence against Howard and Stringer. The court properly ruled that the challenged statements came within the Evidence Code section 1250 state-of-mind exception to the hearsay rule, and therefore posed no confrontation problem.

Howard and Stringer are correct that the court was required to engage in a multi-step analysis to determine whether Forstein's out-of-court statements were admissible against them. As we explain, the court has discretion to admit or exclude evidence subject to our independent review of constitutional questions relating to confrontation of witnesses.

(1) Relevance:

The first question was whether the proffered statements were relevant. Only relevant evidence is admissible (Evid. Code, § 350), and all relevant evidence is admissible, unless excluded under the federal or California Constitution or by

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time or (b) create substantial danger of under prejudice, of confusing the issues, or of misleading the jury."

[12] Evidence Code section 356 reads:

"Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

statute. (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d).) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The trial court has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence. [Citations.]" (*People v. Scheid* (1997) 16 Cal.4th 1, 14.)

The court did not abuse its discretion in ruling that Forstein's statements were relevant. The taped telephone messages demonstrated Forstein's fear for Chad's safety, animosity toward the victims, and efforts to goad Howard into giving her money to move -- all tending to establish a motive for later conspiring to injure or kill LaMarr and his family. Forstein's subsequent statements were relevant as evidence of her plan to bring Howard and others from San Francisco to kill the Morrises. The conversation overheard by Hodges identified the time Forstein brought Howard into the plan. The existence of the plan to harm the Morris family was also relevant to Stringer's liability as an aider and abettor. Thereafter, a jury could find Stringer knew about the criminal enterprise and helped bring it to fruition based on evidence Stringer drove Howard back to Sacramento, knew Howard took guns with him, and joined Howard in confronting LaMarr upon their arrival at Franklin Villa.

(2) Right to Confront Witnesses:

The second question was whether Forstein's relevant out-of-court statements were admissible against Howard and Stringer without violating their right of confrontation. "'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' [Citation.]" (*Lilly v. Virginia* (1999) 527 U.S. 116, 123-124 [144 L.Ed.2d 117, 126] (*Lilly*).) "[T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) 'the evidence falls within a firmly rooted hearsay exception' *or* (2) it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." (*Lilly, supra,* at pp. 124-125 [144 L.Ed.2d at p. 127, emphasis added, quoting *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [65 L.Ed.2d 597, 608] (*Roberts*).)

A hearsay exception is firmly rooted "if, in light of 'longstanding judicial and legislative experience,' [citation], it 'rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the "substance of the constitutional protection."' [Citations.] This standard is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proven over time 'to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an

oath' and cross-examination at a trial. [Citation.]" (*Lilly*, *supra*, 527 U.S. at p. 126 [144 L.Ed.2d at pp. 127-128].) "[W]hether the statements fall within a firmly rooted hearsay exception for Confrontation Clause purposes is a question of federal law." (*Id.* at p. 125 [144 L.Ed.2d at p. 127].) If, as in *Lilly*, the proferred statement is inherently unreliable and falls outside a firmly rooted hearsay exception, the prosecution must satisfy the second prong of the *Roberts* test in order to introduce the statements. (*Lilly*, *supra*, at pp. 131, 134 [144 L.Ed.2d at pp. 131, 132-133].)

The Evidence Code section 1250 state-of-mind exception to the hearsay rule is firmly rooted in California's decisional and statutory law. (See Assem. Com. on Judiciary com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 1250, pp. 280-281; *People v. Alcalde* (1944) 24 Cal.2d 177; see also *People v. Morales* (1989) 48 Cal.3d 527, 552 (*Morales*).) Included within this hearsay exception are statements offered to show the declarant's intent to do a future act, such as draw others into a plot to rob a restaurant or to commit murder. (*People v. Sanders* (1995) 11 Cal.4th 475, 518 (*Sanders*); *Morales*, *supra*, at p. 552.) Statements within this exception are admissible against confederates as well as declarants. (*Sanders*, *supra*, at pp. 515, 518; *Morales*, *supra*, at pp. 551-552; *People v. Han* (2000) 78 Cal.App.4th 797, 806.)

We independently review the trial court's ruling on this "fact-intensive, mixed question[] of constitutional law" (*Lilly*, *supra*, 527 U.S. at p. 136 [144 L.Ed.2d at p. 134]), and conclude

it properly found that Forstein's statements fell within the Evidence Code section 1250 state-of-mind exception to the hearsay rule. The taped telephone messages showed Forstein's fear of her neighbors, concern for Chad's safety, and anger at Howard for not paying her the money she said he owed. The remaining statements reveal Forstein's intent to bring Howard and his confederates from San Francisco to kill LaMarr and his family. Her warnings to the Finches show knowledge of what was about to happen.

(3) Trustworthiness:

The third question before the court was whether Forstein's statements were trustworthy under Evidence Code section 1252. The statute requires exclusion "only if the circumstances are such as to suggest that a statement is *not* trustworthy." (*People v. Karis* (1988) 46 Cal.3d 612, 635, emphasis in original.) Declarations of present existing state of mind, "'made in a natural manner and not under circumstances of suspicion, carry the probability of trustworthiness.'" (*People v. Spencer* (1969) 71 Cal.2d 933, 947, citation omitted.) In deciding whether a statement is trustworthy within the meaning of Evidence Code section 1252, the court must "'apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion.'" (*People v. Edwards* (1991) 54 Cal.3d 787, 820.) We conclude there was no abuse of discretion here.

The sheer volume and consistency of Forstein's statements argue in favor of trustworthiness. She repeatedly expressed fear for Chad's safety, anger at Wanda Frazier and her family for bullying Chad, frustration at Howard's failure to protect his son from danger, and the intent to do something about the problem. The threats recounted by neighbors and coworkers before September 20, 1999, may have included an element of "puffing" that she knew tough guys in San Francisco. However, Forstein's statements in the September 20 argument with LaMarr and his mother, and the subsequent phone call to Howard, clearly expressed the anger and fear of the moment. We will not second-guess the court in its implied finding Forstein's statements were trustworthy in the circumstances of this case.

(4) Prejudicial Effect and Probative Value:

The fourth question before the court in assessing the admissibility of Forstein's statements was whether their prejudicial effect substantially outweighed their probative value under Evidence Code section 352. "'The prejudice which [section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]'" (*Zapien, supra,* 4 Cal.4th at p. 958.) We review rulings under Evidence Code section 352 for abuse of discretion. (*People v. Hart* (1999) 20 Cal.4th 546, 606.)

Howard claims that he was unduly prejudiced by the admission of Forstein's statements, beginning with the taped telephone messages. He contends the "only value of all of this untimely September 8 and 9 taped evidence of bad character, uncharged and unconvicted crimes, and other unfounded allegations and invitations to racist bias was to inflame the jury" and distract it from the actual issues relating to his guilt of first degree murder. Howard says the other statements showed that "Forstein viewed her 'ex' as a person who would have the character to take care of her problems with violence if need be. He was clearly the 'model' on which one-eyed whomever, a pretty clear rhetorical device to signify him, was built."

We conclude the court properly exercised its discretion to exclude portions of the taped telephone messages that accused Howard of wrongdoing unrelated to the case. The remaining portions of the tapes provided general background on the family dynamics, and Forstein's diatribe against Howard was arguably more prejudicial to Forstein than anyone else. As we already indicated, the statements Forstein made closer to the September 22, 1999, killing were probative of her plan to bring Howard to Sacramento to kill LaMarr and his family, and were not unduly prejudicial within the meaning of Evidence Code section 352.

(5) Edited Telephone Messages:

Stringer claims that if the taped telephone messages were properly admitted under Evidence Code section 1250, he was entitled to have the jury hear the complete, unedited version of

the messages pursuant to Evidence Code section 356. The court rejected Stringer's argument, finding Evidence Code section 356 did not apply "if the calls are separated by time where it wasn't continuing sequence." On appeal, Stringer contends the court's ruling prevented the jury from fully understanding the unreliability of the taped statements and Forstein's true state of mind.

Stringer is correct that the purpose of Evidence Code section 356 "is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.' [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 156.) However, "[t]he rule is not applied mechanically to permit the whole of a transaction to come in without regard to its competency or relevancy; . . ." (1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 37, p. 369.)

Stringer does not cite us to the unedited version of the taped telephone messages. Given the silent record, we cannot assume the court abused its discretion in denying Stringer's request to admit the messages in their entirety. (*People v. Scott* (1944) 24 Cal.2d 774, 777.)

B. Admission of Victim's Picture:

In pretrial motions, the defense objected to introduction of nine photographs of the victim, Howard Morris. These included autopsy photographs, a videotape of the crime scene, and exhibit 3 -- a seven-by-ten-inch enlargement of a family photograph of Morris standing alone. The defense opposed introduction of exhibit 3 on grounds it lacked relevance, elicited sympathy for the victim, and was cumulative of other evidence. The prosecution argued that exhibit 3's depiction of the victim's size was relevant to Howard's claim of self-defense. The court excluded exhibit 3, stating, "I don't see where that photo assists the jury in determining the size of the victim, . . ." However, the court left open the possibility of reconsideration if the photograph became relevant in the course of trial.

The prosecution raised the issue of exhibit 3 again after LaMarr testified on cross-examination that he had taken a baseball bat away from his 207-pound brother just before the shooting. In response to an objection on grounds exhibit 3 did not show the comparative size of LaMarr and his brother, the prosecutor offered a photograph of Morris with his entire family, later marked as exhibit 68. The court overruled the defense objection to exhibit 3, but delayed its introduction. The court deferred ruling on the admission of exhibit 68 until the end of trial, subject to introduction of evidence on the date the photo was taken, and a discussion on how it might be cropped to show only Morris and LaMarr. Left open was the

question whether exhibit 3 would be shown to the jury at all if the court admitted the cropped version of exhibit 68. Howard's attorney pressed for a ruling after his client testified that he shot Morris because he was afraid. The court admitted exhibit 3, and excluded exhibit 68 over defense objection.

Howard reiterates on appeal his earlier claim that exhibit 3 was cumulative, misleading, unduly prejudicial, and lacked relevance because it did not show Morris's size in relation to LaMarr. He contends the sympathy engendered by introduction of the enlarged photo of Morris while alive was exacerbated by what counsel describes as Wanda Frazier's emotional outburst during trial. Howard maintains the "error goes to the very heart of the case. The prosecution had to show the situation confronting [Howard] was not one where he could mistake reasonably or unreasonably the approaching [Morris] [w]as about to attack. The defense needed to raise a reasonable doubt in the minds of the jurors. [¶] The picture was indelibly that of an innocent, nice young man of smaller than his actual stature and was taken at Easter. It was misleading, and it was inflammatory under the circumstances, plus it was likely to raise sympathy for the young man and his family. It had no significant actual probative value in the case . . . ."

We have carefully reviewed exhibits 3, 4, 5, 6, and the photo identified as exhibit 68, and conclude there was no abuse of discretion. We acknowledge exhibit 3 was only marginally relevant to show Morris's size at the time of his confrontation

with Howard. However, the court was within its discretion to reject the defense argument the photograph was inflammatory and unduly prejudicial when viewed with other pictures of the victim. Even if we were to conclude the court erred in admitting exhibit 3, the error was harmless in light of other strong evidence to negate Howard's claim of self-defense.

C. CALJIC No. 8.44:

Howard testified in his own defense that he had reacted to Morris in fear, "[b]ecause [Morris] wanted to catch [him] to take [his] gun, and if he take [his] gun he going to kill [him] and Chad." The court instructed the jury on first degree murder, second degree murder, and manslaughter. With respect to voluntary manslaughter, the court explained that "[t]here is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion *or* in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life to great bodily injury." (Emphasis added.) It instructed the jury in detail on what constituted a sudden quarrel or heat of passion for purposes of reducing murder to manslaughter.

Howard does not appear to have relied on a heat of passion defense at trial, and there is little evidence to support such a theory.[13] He nonetheless argues on appeal that under the

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[13] In closing argument, Stringer's counsel uses the concept of heat of passion in describing Morris's reaction to LaMarr's account of the assault, and argues the young man's

circumstances of the case, the court should not have read CALJIC No. 8.44 (6th ed. 1996) in its entirety. He contends the instruction, as read, erroneously removed fear as a basis for heat of passion.[14] Howard cites in support of this argument *People v. Breverman* (1998) 19 Cal.4th 142, 163, which states that "'"[N]o specific type of provocation [is] required [for the heat of passion defense] . . . ."' [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any '"'[v]iolent, intense, high-wrought or enthusiastic emotion.'"'." Howard suggests the second sentence in the instruction should have been revised to read: "'However, if these emotions would cause judgment to give way to impulse and rashness in a reasonable person, they may constitute the heat of passion previously explained.'" He maintains the instructional error denied him the right to jury trial on the heat of passion defense. We reject Howard's argument.

There is no indication Howard offered his modified version of CALJIC No. 8.44 at trial. The trial court is not obligated

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"uncontrollable" and "unpredictable rage" was "an unusual and unnatural consequence . . . not normal and expected."

[14] The challenged portion of the instruction reads: "[n]either fear, revenge nor the emotion induced by and accompanying or following an intent to commit a felony nor any or all of these emotional states in and of themselves constitute the heat of passion referred to in the law of manslaughter. [¶] Any or all of these emotions may be involved in a heat of passion that causes judgment to give way to impulse and rashness. . . . Also any one or more of them may exist in the mind of a person who acts deliberately and from choice, whether that choice is reasonable or unreasonable."

to revise or improve accepted and correct jury instructions unless counsel makes the request. (*People v. Kelly* (1992) 1 Cal.4th 495, 535.)

Moreover, it is well-recognized that "'"[e]rror cannot be predicated upon an isolated phrase, sentence or excerpt taken from the instructions . . . since, in order to determine the correctness . . . in their relations to and with each other and in the light of the instructions as a whole and whether a jury has been correctly instructed is not to be determined from a consideration of a part of an instruction or one particular instruction, but from the entire charge of the court."'" (*People v. Rhodes* (1971) 21 Cal.App.3d 10, 21 (*Rhodes*).) We conclude that read as a whole, the instructions on voluntary manslaughter provided a correct statement of the law -- that neither anger, nor any other emotion, was sufficient *by itself* to support the heat of passion defense. As the court explained to the jury, the law also requires evidence that the emotion impaired or disturbed the defendant's reason.

D. Instructions on Imperfect Self-defense:

Howard also contends the court erred in instructing the jury on imperfect self-defense. The court instructed the jury on justifiable homicide and self-defense, beginning with the charge that "[h]omicide is justifiable and not unlawful when committed by any person in the defense of himself if he actually and reasonably believed that the individual killed intended to commit a forcible and atrocious crime or that there was imminent danger of that crime being accomplished."

Inserted amid the self-defense instructions was CALJIC No. 5.17 (6th ed. 1996), which contrasts imperfect self-defense with justifiable homicide based on reasonable fear and well-founded belief in the necessity to act. CALJIC No. 5.17 explains that a "[a] person who kills another person in the *actual but unreasonable belief* in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary or involuntary manslaughter." (Emphasis added.) The instruction properly omits reference to the term "self-defense." "'[U]nreasonable self-defense' is . . . not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter. And voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder." (*People v. Barton* (1995) 12 Cal.4th 186, 200-201.)

Howard takes issue with the language of CALJIC No. 5.51 (6th ed. 1996) which appears half a page later in the reporter's transcript, and reads: "Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind *as a reasonable person* an actual belief and fear that he is about to suffer bodily injury

and if a reasonable person in the like situation seeing and knowing the same facts would be justified in believing himself in like danger and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual beliefs, the person's right of self-defense is the same whether the danger is real or merely apparent." (Emphasis added.)

We conclude CALJIC No. 5.51 is a correct statement of the law. (See *People v. Jackson* (1965) 233 Cal.App.2d 639, 641-642; see also 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 68, pp. 402-403, and cases cited therein.) We also reject the suggestion the instruction misled the jury into believing imperfect self-defense applies only where the perception of danger is objectively reasonable. The language of CALJIC No. 5.51 expressly refers to the right of self-defense; CALJIC No. 5.17, the imperfect self-defense instruction, does not. Moreover, CALJIC No. 5.51 is preceded and followed by instructions that refined the definition of self-defense. Viewed as a whole, the instructions were not misleading. (*Rhodes, supra,* 21 Cal.App.3d at p. 22.)

III

Stringer's Appeal

The prosecution sought Stringer's conviction of first degree murder on either of two theories of vicarious liability: (1) he aided and abetted the assault on LaMarr, and Morris's killing was a natural and probable consequence of the assault; or (2) he aided and abetted the murder of Morris. As the

prosecutor argued in rebuttal, "Mr. Stringer's the one that came along, drove the car. He's the muscle."

On appeal, Stringer suggests the fact he "was acquitted of first degree murder and convicted of the lesser included offense of second degree murder . . . indicates a belief on the jury's part that the prosecution had not proved [he] was part of a plan to kill when he arrived in Sacramento and confronted LaMarr." He contends there is insufficient evidence to support his conviction of second degree murder, and the court erred in instructing the jury.

A. Natural and Probable Consequence of Assault:

We already explained that "under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.]" (*McCoy, supra,* 25 Cal.4th at p. 1117.) In *People v. Prettyman* (1996) 14 Cal.4th 248, 267 (*Prettyman*), the Supreme Court noted that it is no easy task to apply the "natural and probable consequences" doctrine to aiders and abettors. "The jury must decide whether the defendant (1) with knowledge of the confederate's unlawful purpose, and (2) with the intent of committing, encouraging, or facilitating the commission of any target crime(s), (3) aided, promoted, encouraged, or instigated the commission of the target crime(s); whether (4) the defendant's confederate committed an offense *other than* the target crime(s); and whether (5) the offense committed by the confederate was a natural and probable

consequence of the target crime(s) that the defendant encouraged or facilitated." (*Ibid.*, emphasis in original.)

"The determination whether a particular criminal act was a natural and probable consequence of another criminal act aided and abetted by a defendant requires application of an objective rather than subjective test. [Citations.] This does not mean that the issue is to be considered in the abstract as a question of law. [Citation.] Rather, the issue is a factual question to be resolved by the jury in light of all the circumstances surrounding the incident. [Citations.] Consequently, the issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant. [Citations.]" (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 (*Nguyen*).)

Stringer argues that on the facts of this case, "the killing of Howard Morris cannot, as [a] matter of law, be determined to have been a natural and probable consequence of any conduct committed by, agreed to, or aided and abetted by [him]." He insists that "there was no evidence to establish that the shooting of LaMarr's brother under the circumstances in which it occurred, was reasonably foreseeable as to [him]." Thus, due process requires reversal of his conviction. Based on the standard of review applied in challenges to the sufficiency of the evidence, we conclude there is substantial evidence that

Morris's killing was a natural and probable consequence of the assault on LaMarr.

Given the content of Forstein's telephone messages, and the fact she and Chad stayed with Howard in San Francisco for two days before returning to Sacramento the day of the killing, the jury could reasonably infer that Howard knew Forstein's version of the circumstances surrounding her claim LaMarr and his family were bullying Chad. Chad told Howard that Howard Morris, Sr., Morris, and most of the people at Franklin Villa had guns. The jury could also infer Howard conveyed at least some of this information to Stringer while the two men were driving to Sacramento. In these circumstances, it was not unreasonable for the jury to assume Stringer was aware of the tension between the two families.

This record also supports the inference that a reasonable person in Stringer's position would have or should have known that the killing was a reasonably foreseeable consequence of the assault on LaMarr. (*Nguyen, supra,* 21 Cal.App.4th at p. 531.) Howard and Stringer told LaMarr they were police, and threatened him at gunpoint. Stringer smashed LaMarr's hand against the mailbox, breaking two bones. In the subsequent call to 911, LaMarr told the dispatcher that his assailants said they were going to get his father and brother. The jury could infer Howard and Stringer believed the same message would also be conveyed to Morris's family. Howard prepared for a response. He left one gun in the bedroom of Forstein's apartment, kept the other gun with him, and went outside. Forstein, Stringer, and

Chad waited inside the apartment. It was for the jury to decide whether the 20-minute delay in Morris's arrival at the scene broke the causal chain. On this record, we cannot say as a matter of law that it did.

B. CALJIC No. 6.24:

We already rejected Stringer's claim the court erred in admitting Forstein's out-of-court statements.[15] We also reject his claim the court erred in modifying CALJIC No. 6.24 (6th ed. 1996) to inform the jury that a statement of intent to do a future act could be considered for any purpose against any defendant.[16]

Stringer contends that based on the language of Evidence Code section 1250, statements of Forstein's state of mind were

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[15] See discussion, *ante*, at pages 19-31.

[16] The instruction read:

"Evidence of a statement made by one alleged conspirator other than at this trial shall not be considered by you as against another alleged conspirator unless you determine:

"1. That from other independent evidence that at the time the statement was made a conspiracy to commit a crime existed;

"2. That the statement was made while the person making the statement was participating in the conspiracy and that the person against whom it was offered was participating in the conspiracy before or during that time; and

"3. That the statement was made in furtherance of the objective of the conspiracy.

"The word statement as used in this instruction includes any oral or written verbal expression or the non-verbal conduct of a person intended by that person as a substitute for oral or written verbal expression.

"*However, statements of intent to do a future act may be considered for any purpose or against any defendant.*" (Emphasis added.)

admissible only against her, the declarant. He argues that if the evidence was admissible against him, "it could *only* be considered as circumstantial evidence of the nature of a plan that Forstein initiated and showed an interest in . . . ." (Emphasis in original.) Thus, according to Stringer, the court erred in admitting the evidence without requiring that the jury find "that [Stringer] knew of the statements, adopted them, discussed them with either Forstein or Howard, or agreed to participate in any revenge-seeking activity which Forstein had threatened." Stringer says he was prejudiced because "it is almost inevitable that the jury used these statements of Forstein against [him] to determine the reasonable foreseeability aspect of the natural and probable consequences case against him."

As we explained, statements showing the declarant's intent to do a future act, such as drawing others into a criminal plot, are within the Evidence Code section 1250 exception to the hearsay rule, and admissible against confederates as well as declarants. (*Sanders*, *supra*, 11 Cal.4th at pp. 515, 518; *Morales*, *supra*, 48 Cal.3d at p. 552.) Admission of such statements under the firmly rooted Evidence Code section 1250 hearsay exception does not violate the Confrontation Clause. (See *Lilly*, *supra*, 527 U.S. at pp. 124-126 [144 L.Ed.2d at pp. 126-128].) Thus, the court's one-sentence addition to CALJIC No. 6.24 was a correct statement of the law.

Stringer also suggests the court abused its discretion in failing to require "foundational facts" before Forstein's

statements were received in the case against him. As we explained, the statements revealing Forstein's intent to bring Howard and others from San Francisco to harm LaMarr and his family were relevant to Stringer's criminal liability as an aider and abettor.[17] In the words of the trial court, Forstein's intent "explains then arguably why defendant Stringer acted the way he did on [the day of the killing]." The instructions on aiding and abetting, which required the jury to find Stringer aided the assault on LaMarr with *knowledge* of his confederates' unlawful purpose, provided the foundational link Stringer claims was lacking.

C. Instructions on the Uncharged Conspiracy:

The information charged all three defendants with murder in count one (§ 187), charged Howard and Stringer with assaulting LaMarr with a firearm in count two (§ 245, subd. (a)(2)), but did not charge defendants with the separate crime of conspiracy (§ 182). The court instructed the jury on conspiracy as one theory of criminal liability against the non-shooters.

Stringer contends the conspiracy instructions were incorrect and misleading because the court failed to: (1) name the target offense; and (2) fully explain the coconspirator's liability for acts committed after termination of the conspiracy.

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[17] See discussion, *ante*, at pages 23 to 24.

1. CALJIC No. 6.10.5:

In *Prettyman*, *supra*, 14 Cal.4th at pages 267-268, the Supreme Court held that instructions on aiding and abetting must identify the target crime or crimes the defendant is alleged to have assisted or encouraged to assist the jury in determining whether the crime charged was a natural and probable consequence of some other criminal act. Where the natural and probable consequences doctrine applies, "a conviction may not be based on the jury's generalized belief that the defendant intended to assist and/or encourage unspecified 'nefarious' conduct." (*Id.* at p. 268.) The court acknowledged that the natural and probable consequences doctrine applies equally to aiders and abettors and conspirators. (*Id.* at pp. 260-261.)

Here, the court identified the target crime as that "committed against LaMarr Morris" in its instructions on aiding and abetting. The instructions also informed the jury that Stringer and Howard were charged in count two with assault with a firearm (§ 245, subd. (a)(2)), which included the lesser crime of battery (§ 242). The court identified LaMarr as the victim in count two on at least two occasions. Stringer's counsel acknowledged in closing argument that with respect to the aiding and abetting instructions, "there's only two crimes that are defined for you. One is the 245, assault with a deadly weapon, and the other is a battery."

With respect to conspiracy, the court modified CALJIC No. 6.10.5 (6th ed. 1996) which read: "A conspiracy is an agreement between two or more persons with the specific intent

to agree to commit the crime of _____, and with the further specific intent to commit that crime, . . .” Instead, it instructed the jury that “a conspiracy is an agreement between two or more persons with the specific intent to agree to commit *a crime* and with the further specific intent to commit that crime.” (Emphasis added.)

Stringer maintains the modified version of CALJIC No. 6.10.5 failed to satisfy the *Prettyman* standard. The instruction “provided no guidance to the jury about what the object of this alleged agreement among the defendants might have been.” He contends the instruction was erroneous “because it left the imagined target to the jury’s imagination, and the other instructions did not correct the possibility that the jury would rely on noncriminal conduct.”

We emphasize once again that instructional error “‘“cannot be predicated upon an isolated phrase, sentence or excerpt taken from the instructions . . . since, in order to determine the correctness . . . in their relations to and with each other and in the light of the instructions as a whole and whether a jury has been correctly instructed is not to be determined from a consideration of a part of an instruction or one particular instruction, but from the entire charge of the court.”’” (*Rhodes*, *supra*, 21 Cal.App.3d at p. 21.) The instructions on aiding and abetting and the charges in count two informed the jury of the target crimes. The court identified LaMarr as the victim in count two, and in no other count. Indeed, the jury convicted Stringer of assault with a firearm in count two, and

could not have mistaken the relationship between that specific finding and application of the natural and probable consequences doctrine. Accordingly, we conclude that the instructions adequately informed the jury of the target crimes.

2. CALJIC No. 6.21:

Under well-established law, a conspiracy "usually comes to an end when the substantive crime for which the coconspirators are being tried is either attained or defeated. [Citations.] It is for the trier of fact -- considering the unique circumstances and the nature and purpose of the conspiracy of each case -- to determine precisely when the conspiracy has ended. [Citations.]" (*People v. Saling* (1972) 7 Cal.3d 844, 852.)

"A criminal defendant is entitled, on request, to a[n] instruction 'pinpointing' the theory of his defense." (*People v. Wharton* (1991) 53 Cal.3d 522, 570.) As a defense to criminal liability under the prosecution's conspiracy theory, Stringer argued that if there was a conspiracy at all, it ended after the assault on LaMarr. He was playing video games with Chad at the time of Howard's encounter with Morris. Stringer argues on appeal that he was denied effective assistance of counsel because his trial attorney failed to request CALJIC No. 6.21 (6th ed. 1996). That instruction reads: "No act or declaration of a conspirator committed or made after the conspiracy has been terminated is binding upon co-conspirators, and they are not criminally liable for any such act."

We conclude other instructions adequately covered the principles set forth in CALJIC No. 6.21. These included CALJIC Nos. 6.16, 6.17, 6.19, and 6.20.[18] Accordingly, Stringer suffered no prejudice from his counsel's failure to request CALJIC No. 6.21.

D. CALJIC Nos. 5.54 and 5.55:

"The duty to instruct, *sua sponte*, on general principles closely and openly connected with the facts before the court also encompasses an obligation to instruct on defenses, including self-defense . . . , and on the relationship of these defenses to the elements of the charged offense." (*People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on other grounds in *Breverman, supra,* 19 Cal.4th at p. 163.) Accordingly, when

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[18] These instructions read, in part:

"Where a conspirator commits an act or makes a declaration which is neither in furtherance of the object of the conspiracy, nor the natural and probable consequence of an attempt to attain that object, he or she alone is responsible for and is bound by that act or declaration, and no criminal responsibility therefore attaches to any of his or her confederates.

"The act or declaration of a person who is not a member of a conspiracy is not binding upon the members of the conspiracy even if the act or declaration tended to promote the object of the conspiracy.

". . . . . .

"Every person who joins a conspiracy after its formation is liable for and bound by the acts done and declarations made by other members in pursuance and furtherance of the conspiracy during the time that he or she is a member of the conspiracy. . . .

"A member of a conspiracy is liable for the acts and declarations of his or her co-conspirators until he or she effectively withdraws from the conspiracy or the conspiracy has terminated. . . ."

instructing the jury on self-defense, the court included CALJIC Nos. 5.54 and 5.55 (6th ed. 1996).[19]

Counsel for Stringer and Forstein asked the court to remove CALJIC No. 5.54, self-defense by an aggressor, from the packet of written instructions given to the jury, and inform the jury that it did not apply to the facts of the case. The prosecution argued the instruction was appropriate because there was evidence Howard was the aggressor. "[Howard's] the one that pulled out a gun, not the victim. The victim is just walking across the street." The court declined to withdraw CALJIC No. 5.54, acknowledging the possibility the jury could find that Howard was the aggressor.

On appeal, Stringer argues that the court erred in reading CALJIC Nos. 5.54 and 5.55 "because Curtis Howard was not the aggressor in the contact with Howard Morris. These instructions improperly restricted defendant Howard's right of self[-]defense and thus his murder conviction cannot stand. Because [Stringer's] liability is derivative of Howard's, [his]

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[19] These instructions read:

"The right of self-defense is only available to a person who initiated an assault if he has done all the following:

"1. He has actually tried in good faith to refuse to continue fighting;

"2. He has clearly informed his opponent that he wants to stop fighting; and

"3. He has clearly informed his opponent that he has stopped fighting.

" . . . . . .

"The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense."

conviction must also be reversed." He says the error was exacerbated by the prosecution argument that self-defense was not available to Howard because of the earlier confrontation with LaMarr.

The principal difficulty with Stringer's argument is that there was conflicting evidence regarding the respective roles played by Howard and Morris in the confrontation that resulted in Morris's death. Contrary to Springer's contentions, the earlier assault on LaMarr was relevant to Howard's claim of self-defense, and the level of his criminal liability for the killing. There is evidence Morris was in a rage when he heard what had happened to LaMarr. He grabbed a baseball bat, climbed through the window of his home, and went to Shirley Hamilton's to call his mother. Morris had calmed down a bit when he took off his shirt, started across the alley, and said in a loud voice, "shouldn't be F'ing with my family." One witness heard Morris yell for Chad to come out with his dog and nunchaks. At the same time, the witnesses generally agreed Morris was unarmed when he approached Howard. Indeed, Howard himself testified he saw nothing in Morris's hands. When Morris got close to Howard, the older man pulled out a gun and shot him.

There was also conflicting evidence on the question whether, as argued by Stringer, there was a "complete break in the chain of events" -- that is, between the assault on LaMarr and the killing of Morris. As we explained, it was for the jury to decide whether "a particular criminal act was a natural and probable consequence of another criminal act aided and abetted

by a defendant . . . ." (*Nguyen*, *supra*, 21 Cal.App.4th at p. 531; see also *Prettyman*, *supra*, 14 Cal.4th at p. 267.)

On this record, we cannot say the challenged self-defense instructions did not apply as a matter of law. It was left to the jury to decide what happened, and to apply CALJIC No. 5.54 and No. 5.55 if appropriate to the facts of the case.

DISPOSITION

The judgments are affirmed. The court is directed to correct the abstract of judgment to properly reflect Stringer's sentence of 17 years to life with the 10-year enhancement in count two to run concurrently with the sentence in count one as stated in the oral pronouncement of judgment. The court shall forward a corrected abstract of judgment to the Department of Corrections.

Callahan, J.

We concur:

Blease, Acting P.J.

Raye, J.